75-1106

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NATIONAL BANK OF NORTH AMERICA,
Petitioner,

against

ASSOCIATES OF OBSTETRICS AND FEMALE SURGERY, INC.,
Respondent,

and

APOLLO PRODUCTIONS, INC., GORDON I. HYDE and GARY B. WHETTON,
Defendants.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF UTAH

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

National Bank of North America petitions for a writ of certiorari to review a judgment of the Supreme Court of the State of Utah which affirmed an order denying the Bank's motion to dismiss the amended complaint.

Opinions Below

The opinion of the Supreme Court of the State of Utah is unreported. (Appendix A, *infra*, pp. A. 1-A. 4.) The order of the Third District Court of Salt Lake County is also unreported. (Appendix B, *infra*, pp. A. 5-A. 6.)

Jurisdiction

The judgment of the Supreme Court of the State of Utah was entered on November 21, 1975. No petition for rehear-

ing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

Question Presented

May the Supreme Court of the State of Utah ignore the decisions of this Court holding that the application of §94 of the National Banking Act (12 U.S.C. §94), which provides that a national bank may only be sued in the county where its principal place of business is located, is mandatory and does not rest in the discretion of the court.

Statute Involved

12 U.S.C. 94. (Appendix C, *infra*, p. A. 7.)

Statement

Petitioner is a national banking association with its principal place of business at 91-16 168th Street, Jamaica, County of Queens, City and State of New York. Petitioner maintains no offices within the State of Utah and transacts no business within that jurisdiction.

On July 21, 1972, Associates of Obstetrics and Female Surgery, Inc. ("Associates") filed its complaint in the Third District Court of Salt Lake County, Utah, in which it alleged, *inter alia*, that Petitioner was negligent in the performance of, and had breached, an agreement with it. Petitioner moved, pursuant to Section 94 of Title 12, U.S. Code, to dismiss the complaint because venue was improper in Utah. The motion was denied, but, on rehearing, the District Court dismissed the complaint as against Petitioner.

Thereafter, Associates filed an amended complaint incorporating the allegations of the original complaint and asserting that Petitioner had waived its right to avail itself of the provisions of 12 U.S.C. 94 by making a loan to a Utah corporation (not a party to this action) and filing an involuntary petition in bankruptcy against that entity. Petitioner moved to dismiss the amended complaint pursuant

to 12 U.S.C. 94, asserting that it had not entered into any agreement in Utah, had not asserted any rights under the laws of the State of Utah, had no branches and did no business within the State of Utah. Associates did not deny any of the foregoing or set forth any additional facts to support its claim of waiver.

By order dated January 28, 1975, the motion to dismiss was denied without opinion. (pp. A. 5-A. 6.) Leave to file an interlocutory appeal was granted and the Supreme Court of the State of Utah, by judgment entered November 21, 1975, affirmed the decision of the District Court. (pp. A. 1-A. 4.)

Although Petitioner had cited *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555 (1963) and *Michigan National Bank* v. *Robertson*, 372 U.S. 591 (1963), the Utah Supreme Court adverted to neither opinion. Instead, that court, without citation of authority, refused to enforce the provisions of §94 holding that its application was ". . . permissive and not exclusive." (p. A. 2). The Court went on to say:

> "While some cases seem to hold that the statute requires actions to be filed in the place where the bank is established, that is not the better holding. The statute has sometimes been held to be mandatory only in cases where a penalty is being claimed against the bank." (p. A. 3).

The Court also reviewed the provisions of 28 U.S.C. §1348 (which grants the Federal courts original jurisdiction of certain actions by and against national banks) and 12 U.S.C. §24(4) (which grants the power to sue and be sued to national banks) and determined that these statutes evidenced an intent not to exclude state courts from jurisdiction in cases involving national banks. Petitioner had never advanced this claim, and this court has held §1348 does not affect the applicability of §94.

After quoting from the opinion in *First National Bank in St. Louis* v. *State of Missouri,* 263 U.S. 640 (1923), which dealt with whether a national bank was subject to a specific state statute, the Utah Supreme Court affirmed the decision of the District Court on the following ground:

> "It appears that the plaintiff by this action is not attempting to interfere with the operation of the Bank, or to frustrate the purpose for which it was created or to impair the efficiency to discharge the duties imposed upon it by law. The Bank is, therefore, amenable to process in the courts of Utah, the same as any other citizen of New York State would be." (p. A. 4)

The issue of whether petitioner had waived the protection of 12 U.S.C. §94 was not considered.

Reasons for Granting the Writ

A writ of certiorari should be granted because the decision of the Utah Supreme Court is in direct conflict with the holdings of this Court in *Mercantile National Bank* v. *Langdeau, supra,* and *Michigan National Bank* v. *Robertson, supra.*

In *Langdeau,* this Court rejected a claim that 12 U.S.C. §94 was permissive in its application and held, 371 U.S. at 562:

> "Thus, we find nothing in the statute, its history or the cases in this Court to support appellee's construction of this statute. On the contrary, all these sources convince us that the statute must be given a mandatory reading."

The Court also refused to hold that 28 U.S.C. 1348* affects the applicability of §94 or modifies its mandatory enforcement.

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* 28 U.S.C. 1348 was derived from the Act of March 3, 1887, which re-enacted §4 of the Act of July 12, 1882.

> "Decisions of this Court have recognized that §4 purported to deal with no more than matters of federal jurisdiction. As we observed in Continental Nat. Bank *v.* Buford, 191 US 119, 123, 124, 48 L ed 119-121, 24 S Ct 54:
> 'The necessary effect of this legislation was to make national banks . . . citizens of the States in which they were respectively located, and to withdraw from them the right to invoke the jurisdiction of the Circuit Courts of the United States simply on the ground that they were created by and exercised their powers under acts of Congress. No other purpose can be imputed to Congress than to effect that result.' See also Leather Mfrs. Nat. Bank *v* Cooper, 120 US 778, 30 L ed 816, 7 S Ct 777. Moreover, nothing in the subsequent history of this statute, now 28 USC §1348, warrants the conclusion that Congress sought, even by implication, to relax the venue restrictions of §5198." 371 U.S. at 566-567.

The Utah Supreme Court's conclusion that §94 should apply only where the maintenance of the suit in a foreign jurisdiction will interfere with or impair the operation of the bank, is wholly inconsistent with *Langdeau.* For the essence of that opinion is that the statute must be applied without regard to whether the litigation will inconvenience the bank if it is maintained in the foreign court.

The Utah Supreme Court's decision also conflicts with the opinion in *Michigan National Bank* v. *Robertson, supra.* There, a Michigan bank extended credit to automobile dealers in Nebraska by purchasing sales installment contracts which provided that the transactions would be governed by Nebraska law. Although such conduct could have been considered as proof that the Nebraska forum would be convenient to the Michigan bank, this Court did not hold that §94 was inapplicable. To the contrary, it reaffirmed the validity of *Langdeau* and remanded the case for a determination of whether the protection of the statute had been waived.

In *Langdeau,* this Court invited Congress to consider the consequences of its holding that the statute must be given mandatory effect. Over twelve years have passed and Congress has taken no action. Clearly then, in the absence of congressional dissatisfaction with that decision it was inappropriate for the Utah Supreme Court to undertake such a radical alteration of the interpretation of the statute.

Finally, the issue presented by this petition is of great importance in the business of banking, for the applicability of Section 94 is presented in a substantial number of litigations involving national banks.* The Utah Supreme Court's unwarranted departure from the holding of *Langdeau* contravenes the public interest in that it departs from the precedents of this Court and introduces a discordant note into an otherwise settled area of Federal law.

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* See, e.g. *Northside Iron & Metal Company, Inc.* v. *Dobson & Johnson, Inc.*, 480 F. 2d 798 (5th Cir. 1973); *Helco Inc.* v. *First National City Bank,* 470 F. 2d 883 (3rd Cir. 1972); *Staley* v. *Homeland, Inc.,* 368 F. Supp. 1344 (E.D. N. C 1974).

Although this Court has granted certiorari in *Radzanower* v. *The First National Bank of Boston,* No. 268, Oct. 1975 Term, which deals with the conflict among the circuits as to whether Section 94 of 15 U.S.C. 78aa (1970) controls the venue of suits against national banks under the Securities Exchange Act of 1934, the Circuits are in harmony that §94 must be mandatorily applied in cases brought under state or other Federal statutes. See, e.g. *Ronson Corp.* v. *Liquifin Aktiengesellschaft,* 483 F. 2d 852 (3rd Cir. 1973); *The First National Bank of Boston* v. *United States District Court for the Central District of California,* 468 F. 2d 180 (9th Cir. 1972); *Bruns, Nordeman & Co.* v. *American Bank and Trust Co.,* 394 F. 2d 300 (2nd Cir.) *cert. denied* 393 U.S. 855 (1968).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 2, 1976

APPENDIX A

IN THE
SUPREME COURT OF THE STATE OF UTAH

ASSOCIATES OF OBSTETRICS AND FEMALE SURGERY, INC.,
a Utah corporation,
Plaintiff and Respondent,

v.

APOLLO PRODUCTIONS, INC.,
a Utah corporation; Gordon I. Hyde and Gary B. Whetton,
individuals, and National Bank Of North America,
Defendants and Appellant.

No. 13992
FILED November 21, 1975
Alan E. Mecham, Clerk

ELLETT, *Justice:*

The defendant National Bank of North America, hereinafter referred to as appellant or Bank, has taken an interlocutory appeal from the ruling of the trial court whereby its motion to dismiss was denied.

The appellant is a national banking association with its principal place of business in the eastern district of New York and with no branch or agent in Utah. It was made a party defendant in this action for the reason that the plaintiff claims to have loaned a large sum of money to the Apollo Productions, Inc., because the Bank agreed to protect the investment and to supervise all deposits of the proceeds of Apollo's films and to see that plaintiff's invest-

ment was satisfied ahead of that of its own. Plaintiff claims that the Bank breached its promises so made.

The Bank claims that the Utah courts lack jurisdiction over it because it is a national banking association. It relies on Title 12, Section 94, of the United States Code, which reads:

> Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases.

Since the Bank is established in the eastern district of New York, it argues that it must be sued there.

The only contention made before us is that of venue.

It is to be noticed that the language of the statute is permissive and not exclusive.

There is another section of the United States Code which is of interest in this matter. That is Section 1348 of Title 28, which provides in substance that federal district courts shall have original jurisdiction of civil actions commenced by the United States against any national banking association, any civil action to wind up such association's affairs, and any action by a banking association established in the district for which the court is held to enjoin the Comptroller of the Currency or any receiver acting under his jurisdiction. This section then provides:

> All national banking associations shall, for the purposes of all other actions by or against them, be deemed citizens of the States in which they are respectively located.

Also by Section 24 of Title 12, U.S.C.A., it is clear that the statute is not mandatory. That section reads:

> Upon duly making and filing articles of association . . . a national banking association shall become, . . . a body corporate, and as such, . . . it shall have power
>
> • • •
>
> Fourth. To sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons.
>
> • • •

It thus appears that there is no intention to exclude state courts' jurisdiction in situations such as this.

While some cases seem to hold that the statute requires actions to be filed in the place where the bank is established, that is not the better holding. The statute has sometimes been held to be mandatory only in cases where a penalty is being claimed against the bank.[1]

In the case of First National Bank in St. Louis v. State of Missouri[2] the Supreme Court said:

> National banks are brought into existence under federal legislation, are instrumentalities of the Federal Government and are necessarily subject to the paramount authority of the United States. Nevertheless, national banks are subject to the laws of a State in respect of their affairs unless such laws interfere with the purposes of their creation, tend to impair or destroy their efficiency as federal agencies or conflict with the paramount law of the United States. National Bank v. Commonwealth, 9 Wall. 353, 362; Davis v. Elmira Savings Bank, 161 U.S. 275, 283. These two cases are cited and followed in the later case of McClellan v. Chipman, 164 U.S. 347, 357, and the principle which they establish is said to contain a rule and an exception, "the rule being the operation of general state laws upon the dealings

1. Guerra v. Lemburg, 22 S. W. 2d 336 (Tex. Civ. App. 1929).
2. 263 U.S. 640, 656, 44 S. Ct. 213, 68 L. Ed. 486 (1923).

> and contracts of national banks, the exception being the cessation of the operation of such laws whenever they expressly conflict with the laws of the United States or frustrate the purpose for which national banks were created, or impair their efficiency to discharge the duties imposed upon them by the law of the United States." See also Waite v. Dowley, 94 U.S. 527, 533.

It appears that the plaintiff by this action is not attempting to interfere with the operation of the Bank, or to frustrate the purpose for which it was created, or to impair the efficiency to discharge the duties imposed upon it by law. The Bank is, therefore, amenable to process in the courts of Utah, the same as any other citizen of New York State would be.

The motion made by the Bank to dismiss was based solely upon the proposition that the action could only be tried in New York, and that is the thrust made in this appeal. The motion as made was correctly denied. We do not search the record to see if there might be other grounds for reversing the trial court,[3] and so we affirm the ruling made by the trial court. Costs are awarded to the respondent.

WE CONCUR:

F. Henri Henriod, Chief Justice — J. Allan Crockett, Justice

R. L. Tuckett, Justice — Richard J. Maughan, Justice

3. Anderson v. Gousset, 208 N. E. 2d 37 (Ill. App. 1965).

EXHIBIT B

IN THE

DISTRICT COURT OF SALT LAKE COUNTY
IN AND FOR THE STATE OF UTAH

Civil No. 206335

ASSOCIATES OF OBSTETRICS AND FEMALE SURGERY, INC., a Utah corporation,
Plaintiff,

vs.

APOLLO PRODUCTIONS, INC., a Utah corporation; GORDON I. HYDE and GARY B. WHETTON, individuals, and NATIONAL BANK OF NORTH AMERICA,
Defendants.

Order Denying Defendant's Motion to Dismiss

Defendant, National Bank of North America's Motion to Dismiss came on regularly for hearing before the Honorable Stewart M. Hanson, Jr., one of the judges of the above-entitled court, on the 11th day of December, 1974. Plaintiff was represented by its attorney, Paul M. Hansen, and Defendant, National Bank of North America, was represented by Barrie G. McKay of McKay, Burton, McMurray & Thurman. The court considered the pleadings, memoranda, affidavits and supplemental briefs and heard oral arguments from counsel, and being fully advised in the premises,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUGED AND DECREED: that Defendant's Motion to Dismiss Plaintiff's Amended Complaint be and the same is hereby denied.

Dated this 28th day of January, 1975.

By the Court:

/s/ STEWART M. HANSON, JR.
District Judge

APPENDIX C

§ 94. Venue of Suits

Actions and proceedings against any association under this chapter may be had in any district of Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases.